STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 8, 2005
v	No. 245582 Oakland Circuit Court
HECTOR SANTIAGO, Defendant-Appellant.	LC No. 99-169672-FC

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), and armed robbery, MCL 750.529. He was acquitted of an additional count of conspiracy to commit armed robbery, MCL 750.157a. Defendant was sentenced to life imprisonment without parole for the murder conviction.[1] He now appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in denying his post-judgment motion for an evidentiary hearing on the issue of his competency to stand trial. We disagree.

A trial court's "decision as to the existence of a 'bona fide doubt' [concerning competency] will only be reversed where there is an abuse of discretion.'" *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990).

The test for competency to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *People v Belanger*, 73 Mich App 438, 447; 252 NW2d 472 (1977), quoting *Dusky v United States*, 362 US 402; 80 S Ct 788; 4 L Ed 2d 824 (1960). "A criminal defendant is presumed to be competent to stand trial absent a showing that 'he is incapable because of his mental condition

[1] Defendant's armed robbery conviction was vacated on double jeopardy grounds.

of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner.'" *Harris*, *supra* at 102, quoting MCL 330.2020(1).

After conviction, "an issue respecting competency can be determined by a motion for a new trial with supporting affidavits or evidence showing substance to the claim that defendant was incompetent at the time of the original trial." *People v Lucas*, 393 Mich 522, 528; 227 NW2d 763 (1975). The defendant must present "evidence of incompetence," *People v Blocker*, 393 Mich 501, 508; 227 NW2d 767 (1975), sufficient to raise a "bona fide doubt" concerning his competency at the time of trial, *Harris*, *supra* at 102. "If such duly-supported motion is filed, the trial court is obligated to hold a hearing on the motion." *Lucas*, *supra* at 528-529; see also *Blocker*, *supra* at 510.

In this case, defendant submitted evidence showing that he is prone to depression and anxiety, and was believed to have an IQ of fifty at the age of fifteen. He also presented evidence suggesting that he may have been affected by his mother's difficulties in coping with her brother's death. This evidence fails to indicate, however, that defendant was not competent at the time of trial. Defendant also submitted affidavits from himself and his mother averring that he was depressed and anxious during trial, and that he was unable to discuss the case intelligently with his attorney or understand the proceedings. However, these affidavits are conclusory and self-serving, and not factual in nature. The affidavit submitted by trial counsel averring that, based on defendant's history and difficulties communicating with him, defendant "may have been incompetent to assist with his defense," is based more on hearsay rather than counsel's observations concerning defendant's competence. Significantly, the issue of defendant's competency was never raised at the time of defendant's trial, and the transcripts of defendant's interviews with the police support that he was coherent and appropriate.

We agree with the trial court that defendant failed to raise a bona fide question concerning his competency at the time of trial, particularly that he was unable to consult with and assist his attorney, or that he did not have a rational or factual understanding of the nature and object of the trial proceedings. Therefore, the trial court did not abuse its discretion in denying defendant's post-judgment motion for an evidentiary hearing or forensic evaluation on the question of defendant's competency at the time of trial.

II

Next, defendant argues that there was insufficient evidence to support his felony murder conviction. We disagree.

The sufficiency of the evidence is reviewed by evaluating the evidence and any reasonable inferences drawn from the evidence, in the light most favorable to the prosecution, to determine whether a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); see also *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). The resolution of credibility disputes is within the exclusive province of the trier of fact, *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990), which may draw reasonable inferences from the evidence. *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

To convict a defendant on an aiding and abetting theory, the prosecution must show that the defendant performed acts or gave encouragement that aided or assisted in the commission of the crime, and that he either intended to commit the crime or knew that the principal intended to commit the crime at the time he gave aid or assistance. *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993). The amount of aid or assistance given is immaterial as long as it had the effect of inducing or encouraging the crime. *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974). Mere presence at the scene, even with knowledge that a crime will be committed, is insufficient. *People v Youngblood*, 165 Mich App 381, 386; 418 NW2d 472 (1988). "An aider and abettor's state of mind may be inferred from all the facts and circumstances." *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995), overruled in part on other grounds in *People v Mass*, 464 Mich 615, 627-628; 628 NW2d 540 (2001).

Regarding aiding and abetting felony murder, "[t]he requisite intent is that necessary to be convicted of the crime as a principal," i.e., malice. *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985). "[I]t therefore must be shown that the aider and abettor had the intent to kill, the intent to cause great bodily harm or wantonly and wilfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm." *Id*. at 278; see also *People v Barrera*, 451 Mich 261, 294; 547 NW2d 280 (1996). "[I]f the aider and abettor participates in a crime with knowledge of his principal's intent to kill or to cause great bodily harm, he is acting with 'wanton and willful disregard' sufficient to support a finding of malice . . . ." *Kelly, supra* at 278-279 (citation omitted).

In this case, the evidence indicated that defendant was aware that codefendant Peter Aponte had a gun and planned to rob the victim. Additionally, defendant admitted that Aponte had discussed killing the victim. Despite this knowledge, defendant drove Aponte and Juan Santiago to the victim's home, dropped off Aponte and Juan Santiago as requested, knowing what they intended to do, and agreed to pick them up if they needed a ride home. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a reasonable jury to find beyond a reasonable doubt that defendant provided assistance in the commission of the crime with knowledge of Aponte's intent to rob and kill the victim.

III

Defendant also argues that the jury's verdict was against the great weight of the evidence. We disagree.

A new trial may be granted "where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). But "absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of credibility 'for the constitutionally guaranteed jury determination thereof.'" *Id*. at 642 (citation omitted). Where the question is one of credibility, the verdict may not be overturned unless the directly contradictory testimony has been so far impeached that it was "deprived of all probative value or that the jury could not believe it." *Id*. at 643, 645-646. We review the trial court's decision for an abuse of discretion. *Id*. at 648 n 27.

As previously discussed, the evidence showed that defendant was aware that Aponte had a gun and planned to rob and possibly kill the victim. Nonetheless, he drove Aponte and Juan Santiago to the victim's home, dropped them off as requested, and offered to pick them up after the offense. This evidence belies defendant's claim that he changed his mind about participating, and, at best, creates a factual question for the jury concerning the degree of defendant's involvement. The evidence does not negate that defendant provided assistance in the commission of the crime with knowledge that Aponte and Juan Santiago intended to rob the victim and had discussed killing him. Although defendant asserts that he participated in the offense under duress, duress is not a defense to homicide. *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1996). The trial court did not abuse its discretion in denying defendant's motion for a new trial based on the great weight of the evidence.

IV

Defendant next argues that reversal is required because his trial counsel was ineffective. We disagree.

Where, as here, a defendant moves for an evidentiary hearing but the motion is denied, review of an ineffective assistance of counsel claim is limited to mistakes apparent on the record. See *People v Bigelow*, 225 Mich App 806, 810; 571 NW2d 520 (1997),[2] *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994); see also *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error. *Id*. at 312, 314. Where counsel's conduct involves a choice of strategies, it is not deficient. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Every effort must be made to eliminate the distorting effects of hindsight. *Id*.; see also *People v Stanaway*, 446 Mich 643, 688; 521 NW2d 557 (1994).

A. Failure to Raise Defenses

Defendant argues that counsel was ineffective for failing to investigate and pursue a potential insanity defense, and in failing to raise the issue of defendant's competency to stand trial. Counsel's decision concerning what defenses to present is a matter of trial strategy. To overcome the presumption of sound trial strategy, defendant must show that counsel's alleged error may have made a difference in the outcome by, for example, depriving defendant of a substantial defense. See *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997).

[2] Vacated in order to convene a special panel, reinstated in *People v Bigelow*, 229 Mich App 218, 221; 581 NW2d 744 (1998).

To prevail on an insanity defense, a defendant must show "that, as a result of mental illness or being mentally retarded as defined in the mental health code, the defendant lacked 'substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law.'" *People v Carpenter*, 464 Mich 223, 230-231; 627 NW2d 276 (2001), quoting MCL 768.21a(1). On this record, there is no evidence to support an insanity defense. Defendant's four statements to the police clearly show that he knew that what Aponte and Juan Santiago were planning to do was wrong. Further, the fact that defendant was able to refuse to directly participate in the crime supports that he was capable of conforming his conduct to the requirements of the law. Merely suffering from some mental illness or retardation not reaching this insanity threshold is insufficient. See *Id*. at 226. Defendant has failed to show that counsel's failure to plead insanity deprived him of a substantial defense.

Similarly, as previously discussed, defendant has failed to come forth with evidence raising a substantial question concerning his competency to stand trial.

B. Failure to Move to Suppress Evidence

There is no record evidence to dispute the police officers' assertion that defendant was not in custody when he gave his four statements. Therefore, the police were not obligated to advise defendant of his rights. See *Miranda v Arizona*, 384 US 436, 478-479; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Because defendant was not subjected to a custodial interrogation, there was no need to determine whether there was a valid waiver of his right against self-incrimination, and his age, mental state, lack of experience, and other circumstances surrounding his statements are irrelevant. Compare *Cheatham*, *supra* at 21-44. Defense counsel is not required to advocate a meritless position. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003); *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). Therefore, defense counsel was not ineffective for failing to move to suppress defendant's statements to the police.

C. Failure to Move for Separate Trials

Defendant concedes that trial counsel joined in codefendant Juan Santiago's motion for complete severance. Nonetheless, defendant argues that counsel was ineffective for failing to file a written motion, properly supported by a brief. However, defendant fails to offer any evidence tending to show that a written motion would have succeeded where codefendant Juan Santiago's motion, which would have inured to defendant's benefit, did not. Additionally, as further discussed in part V, *infra*, the trial court did not err in denying the motion for complete severance. Counsel's failure to file a written motion did not affect the outcome and, therefore, did not deprive defendant of the effective assistance of counsel. Thus, defense counsel was not ineffective for failing to file a written motion for a separate trial.

D. Failure to Offer Evidence of Defendant's Intellectual Limitations

"Decisions concerning what evidence to present and whether to call or question a witness are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

In this case, malice could be inferred from the fact that defendant assisted in the crime with knowledge that Aponte and Juan Santiago intended to rob and perhaps kill the victim. See *Kelly*, *supra* at 278-279. Defendant's argument is impermissibly dependent on hindsight concerning what other evidence (of defendant's intellectual limitations) defendant believes the jury might have found important. See *LaVearn*, *supra* at 216. Further, evidence of mental abnormalities short of legal insanity cannot be used to avoid or reduce legal responsibility by negating specific intent. *Carpenter*, *supra* at 226. Thus, trial counsel's failure to proffer evidence of defendant's diminished capacity did not deprive defendant of a substantial defense or affect the outcome.

V

Next, defendant argues that the trial court erred by declining to completely sever his trial from Juan's Santiago's trial. We disagree.

The decision to sever or join the trials of codefendants lies within the discretion of the trial court. *People v Hana*, 447 Mich 325, 331, 346; 524 NW2d 682 (1994), amended 447 Mich 1203 (1994). Severance is mandated by MCR 6.121(C) only when a defendant clearly and affirmatively demonstrates through an affidavit or offer of proof that his substantial rights will be prejudiced by a joint trial and that severance is the necessary means of rectifying the potential prejudice. *Id.* at 331, 346. "The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision." *Id*. at 346-347.

Although our Supreme Court has "recognize[d] that a joint trial of codefendants presenting antagonistic defenses has serious negative implications for the accused[,]" "[i]nconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' or 'irreconcilable.'" *Id*. at 347, 349-350. "Incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice" to require severance. *Id*. at 349, quoting *United States v Yefsky*, 994 F2d 885, 896 (CA 1, 1993). Rather, to warrant reversal, "[t]he tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other." *Id*. at 349, quoting *Yefsky*, *supra* at 897.

In this case, defendant and codefendant Juan Santiago were tried jointly, but before separate juries. "The use of separate juries is a partial form of severance to be evaluated under the standard . . . applicable to motions for separate trials." *Id*. at 331. In such cases, "[t]he issue is whether there was prejudice to substantial rights after the dual-jury procedure was employed." *Id*.

Defendant and Juan Santiago both blamed codefendant Aponte. They each agreed that defendant's role in the offense was to drive Aponte and Juan Santiago to a location near the victim's home. Juan Santiago claimed that whatever he and defendant did was compelled by Aponte's threats. It is apparent that defendant's and Juan Santiago's defenses were not mutually inconsistent, let alone irreconcilable. Further, defendant's fear of being cross-examined by Juan Santiago's attorney if he testified did not justify severance.

Because dual juries were used, there was no danger that a single jury would convict one defendant, despite the absence of proof beyond a reasonable doubt, in order to rationalize the acquittal of another. Further, each defendant was charged as an aider and abettor in a murder committed by Aponte. In this circumstance, their "[f]inger pointing . . . does not create mutually exclusive antagonistic defenses." *Hana*, *supra* at 360-361. Additionally, Juan Santiago waived his Fifth Amendment rights and, therefore, could be compelled to testify before defendant's jury.[3]

For these reasons, the trial court did not abuse its discretion in denying the motion for complete severance.

VI

Defendant next argues that the trial court erred by restricting inquiry into Aponte's reputation for violence. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

Under MRE 405, where evidence of a person's character is admissible, proof may be made either by evidence of reputation, or by specific instances of conduct. Under MRE 803(21), evidence of "[r]eputation of a person's character among associates or in the community" is not hearsay. In order for reputation evidence to be admissible, however, its proponent must show that it is relevant under MRE 401, i.e., that it tends to prove (or disprove) a fact of consequence at trial.

In the present case, defendant sought to introduce evidence of Aponte's reputation for violence in order to establish a duress defense to the armed robbery charge. The trial court ruled that there had to be a showing that defendant and Juan Santiago were aware of Aponte's reputation.

Although "duress is not a defense to homicide," it is arguably a defense to armed robbery. See *Gimotty*, *supra* at 257. To prove duress, a defendant must show:

> (A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
>
> (B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> (C) The fear or duress was operating on the mind of the defendant at the time of the alleged act; and

[3] A reviewing court may not employ a "what if" analysis to guess whether one or both defendants would have testified if they had been tried separately. See *Hana*, *supra* at 361.

(D) The defendant committed the act to avoid the threatened harm. [*People v Lemons*, 454 Mich 234, 247; 562 NW2d 447 (1997), quoting *People v Luther*, 394 Mich 619, 623; 232 NW2d 184 (1975).]

In the present case, defendant sought to introduce evidence of Aponte's reputation in order to show that his fear of Aponte was reasonable. However, evidence of Aponte's reputation would not be logically relevant to a duress defense absent a showing that defendant was aware of Aponte's reputation. The trial court did not abuse its discretion in requiring that defendant show that he was aware of Aponte's reputation as a prerequisite to presenting the evidence in question.

VII

Defendant next argues that the prosecutor committed misconduct that deprived him of a fair trial. We disagree.

Claims of prosecutorial misconduct are reviewed on a case-by-case basis, and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 and nn 5-7; 531 NW2d 659 (1995). Where a defendant fails to object to alleged misconduct, "appellate review is precluded unless a curative instruction could not have eliminated possible [resulting] prejudice or [where] failure to consider the issue would result in a miscarriage of justice." *Noble*, *supra* at 660; see also *People v Schutte*, 240 Mich App 713, 722; 613 NW2d 370 (2000).[4] As with other unpreserved issues, defendant must show a plain error (i.e., one that is clear or obvious) affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 548-549, 552-553; 520 NW2d 123 (1994); see also *Schutte*, *supra* at 720.

A. Referring to Facts Not of Record

Defendant complains that the prosecutor improperly stated that defendant dropped off Aponte and Juan Santiago a block from the victim's house, when testimony indicated that the distance was actually a mile. "A prosecutor may not argue the effect of testimony that was not entered into evidence at trial." *Stanaway*, *supra* at 686. Here, however, defendant indicated in his police statements that he dropped off Aponte and Juan Santiago a block from the victim's home. There was also testimony that the distance was approximately a mile from the victim's home. At best, there was a question of fact concerning the location of the drop-off point. In any event, there was factual support for the prosecutor's argument and, therefore, the prosecutor did not commit misconduct.

Defendant also argues that the prosecutor improperly used David Santiago's police statement as substantive evidence when he mentioned that, contrary to David's trial testimony, David told the police that, during the initial ride to the victim's home, "they start talking

[4] abrogated on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

immediately about the robbery." We disagree. The prosecutor properly pointed out that there was a conflict between David's trial testimony, and what he told the police.

B. Appealing to Sympathy

A prosecutor may not appeal to the sympathies and emotions of the jurors. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Here, the prosecutor mentioned that the victim was a giving person, who would no longer be able to give to the community. Viewed in context, the prosecutor made it clear that he wanted the jury to follow the law and the evidence, and not act upon sympathy or emotion. The trial court instructed the jury to the same effect. Therefore, there was no misconduct that deprived defendant of a fair trial.

C. Denigrating the Defense

"A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *Watson*, *supra* at 592. Here, the prosecutor stated that Juan and David Santiago had perjured themselves and attempted to perpetrate a fraud. Although the language used by the prosecutor was strong, the prosecutor could properly argue that Juan and David were not worthy of belief. Further, contrary to what defendant asserts, the prosecutor did not accuse either defendant or his attorney of perpetrating a fraud. Thus, the prosecutor's conduct was not improper, and there was no plain error affecting defendant's substantial rights in this regard.

D. Shifting the Burden of Proof

As defendant argues, "a defendant has no burden to produce any evidence." *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). However, "once the defense advances evidence or a theory, argument on the inferences created do not shift the burden of proof." *Id.*

Here, the prosecutor urged the jury to disregard defendant's argument that he should be acquitted because "all he did was drop them off." The prosecutor then asked, "what valid legal justification did defense counsel give you for this brutal murder?" Defendant's objection was sustained.

While a prosecutor may comment on a defendant's theory of the case, defendant never contended that this case involved a justifiable homicide. Thus, the prosecutor's comment was improper. However, defendant's objection was sustained, and the trial court later instructed the jury that defendant did not have a duty to prove anything, and that arguments of counsel are not evidence and must not be considered. Jurors are presumed to follow the court's instructions unless the contrary is clearly shown. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). Because no contrary showing has been made here, appellate relief is not warranted as there is nothing to support that this comments affected defendant's substantial rights.

Defendant also claims that the prosecutor impermissibly reduced his burden of proof when he mentioned that, while defendant had a trial by a judge and a jury, the victim could not appeal what happened to him. Defendant cites no legal authority for the argument that this comment somehow lessened the prosecutor's burden of proof. Argument must be supported by citation to appropriate authority or policy. *People v Sowders*, 164 Mich App 36, 49; 417 NW2d 78 (1987). An appellant's failure to properly address the merits of his assertion of error

constitutes abandonment of the issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Regardless, the jury is presumed to have followed the court's instructions that the prosecutor has the burden of proof. Thus, defendant has failed to show that this comment amounted to misconduct that deprived him of a fair trial.

VIII

Lastly, defendant argues that the cumulative effect of multiple errors deprived him of a fair trial. We disagree.

"Although one error in a case may not necessarily provide a basis for reversal, it is possible that the cumulative effect of a number of errors may add up to error requiring reversal" if the defendant "was denied his right to a fair trial." *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). Here, however, having failed to find a number of errors, defendant is not entitled to a new trial on this basis. See *id.*

Affirmed.

/s/ Kathleen Jansen
/s/ Kurtis T. Wilder